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FEDERAL COMMUNICATIONS COMMISSION
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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 76.51
of the Commission's Rules to
Include Newton, New Jersey in
the Market Currently Designated
the "New York, New York-Linden-
Patterson-Newark, New Jersey"
Market

MM Docket No. 93-290

To: Chief, Mass Media Bureau

RESPONSE TO REQUEST FOR TEMPORARY EMERGENCY RELIEF

TCI of Northern New Jersey, Inc. ("TCI-NNJ") hereby responds to the Request for Temporary Emergency Relief filed by Mountain Broadcasting Corporation, licensee of WMBC-TV, Channel 63, Newton, New Jersey ("WMBC"). The Request seeks a temporary market hyphenation to resolve copyright issues otherwise impeding WMBC's cable carriage. TCI does not object to the relief being sought, but feels obliged to correct the badly distorted record in this case.

In an effort to secure Commission sympathy, WMBC has fashioned its petition largely as a character assault on TCI-NNJ. It accuses TCI-NNJ of "unconscionable" and "unlawful" action -- alleging this case is "yet another example of the apparently arrogant company-wide effort . . . to evade compliance with the 1992 Cable Act." WMBC Request at 13, n.25. As shown below, the accusation is entirely without merit. WMBC and its counsel evidently believe that the political climate is right for cable-bashing, and that the Commission will respond positively to such pleadings, regardless of their accuracy. Such an approach does

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an injustice to the Commission and all those parties who come before it. While TCI-NNJ does not oppose the requested relief (and, indeed, would have welcomed the opportunity to file a joint request), it strongly opposes any decision in this case which would explicitly or implicitly suggest Commission agreement with the groundless accusations made by WMBC's regarding TCI-NNJ. Despite WMBC's accusations, TCI-NNJ has fully complied with its must carry obligations and will gladly restore carriage of WMBC if the current copyright problem is resolved.

WMBC's Petition entirely overlooks the positive implications of TCI-NNJ's launch of the station last summer. TCI-NNJ voluntarily placed WMBC on cable channel 10 -- between WWOR and WPIX, two very popular broadcast stations. For a station with no historic carriage and over-the-air channel 63, this was an extremely favorable cable channel assignment. In addition, TCI voluntarily purchased and installed special equipment to resolve a signal quality problem plaguing reception of WMBC, without first obtaining payment from the Station. These are hardly the actions of an operator trying to "evade" must carry obligations.

WMBC, nevertheless, implies there is something sinister in TCI's post-launch recognition that carriage of WMBC posed a serious copyright problem. Nothing could be further from the truth. If TCI wanted to avoid carriage, logic dictates it would have identified the issue before, rather than after, launching WMBC. And the original oversight was costly for TCI, not for WMBC. Having failed to secure appropriate copyright indemnification, TCI must now bear the full copyright costs for carrying WMBC for the 1993/2 copyright accounting period.¹ WMBC gets the benefit of an introduction to TCI-NNJ's subscribers without the associated copyright costs.

¹ The suggestion that TCI-NNJ permanently waived its right to secure copyright indemnification by failing to raise the issue last spring must be rejected. TCI is not trying to secure a retroactive contribution, it is simply trying to protect itself from future copyright liability.

Despite its suggestion that TCI-NNJ somehow fabricated the current copyright problem, nowhere does WMBC actually dispute TCI's copyright liability. Indeed, the relief requested by WMBC is predicated on that copyright liability. The copyright problem is not a "pretext" for discontinuing carriage -- it is a very real financial issue. If the copyright problem did not exist, TCI-NNJ would have continued the carriage of WMBC that it began last summer.

WMBC errs in suggesting that TCI-NNJ "seeks to take unfair advantage of [the market hyphenation] proceeding to avoid ... 'must carry' obligations...." WMBC Request at 13, n. 24. TCI-NNJ is not trying to take advantage of this proceeding, it is simply trying (as it is legally entitled) to avoid unnecessary copyright liability. Indeed, WMBC itself notes repeatedly that TCI-NNJ has not opposed the station's market hyphenation petition. The station fails to appreciate that such cooperation is inconsistent with the antagonistic role it assigns to TCI-NNJ.

The suggestion that WMBC had inadequate notice of its deletion is patently absurd. In a letter to WMBC, dated October 4, 1993, TCI-NNJ's System Manager raised the copyright problem and noted that deletion would occur unless an indemnification agreement was forthcoming. Id., Attachment A-6. In a November 5, 1993, telephone conversation with WMBC's counsel, TCI-NNJ's counsel explained the copyright costs and the fact that dividing the system between WMBC's "local" and "distant" communities also would be quite expensive.² See Horvitz Declaration. WMBC's counsel indicated that he understood the situation and that his client was not interested in assuming any costs at that time. He had no objection to TCI-NNJ immediately notifying its subscribers of the pending deletion. Id.³ The letter sent on December

² WMBC was represented at that time by Christopher Wood of Fleischman & Walsh.

³ Had TCI-NNJ not dropped the signal prior to January 1, 1994, it would have incurred copyright liability for the entire 1994/1 copyright accounting period.

7, 1993 from TCI-NNJ's System Manager to WMBC simply confirmed what WMBC had already been told. See WMBC Request, Attachment A-8. While the parties explored the engineering issues involved in arranging partial carriage of WMBC throughout this period, TCI-NNJ made it clear from the start that it believed considerable costs were involved and that WMBC would be responsible for those costs.

While WMBC complains of prejudicial delay, it turns out that the station had no real interest in reaching a "compromise" solution. WMBC pushed TCI-NNJ to analyze costs involved in limiting WMBC's carriage to its copyright "free" zone, but it is now apparent that WMBC had no intention of meeting (or even sharing) these costs. If anyone delayed in this matter, it was WMBC. The Station could have challenged TCI-NNJ's must carry position long ago. Likewise, it could have advanced the copyright solution proffered here before TCI-NNJ was forced to stop carriage. Instead, it chose to delay and to use the opportunity to blame its problems on TCI-NNJ.⁴

The Commission must remember that WMBC always had, and still has, the ability to ensure its continued carriage on TCI-NNJ's cable system. Consistent with Section 614 of the 1992 Cable Act, all it needs to do is provide TCI-NNJ with copyright indemnification. Given its optimistic assessment of the likelihood that its market hyphenation request will soon be granted, providing such indemnification should hardly bother WMBC.⁵

⁴ Given the numerous conversations that occurred between counsel for TCI-NNJ and WMBC, it is surprising that WMBC never raised the possibility of jointly seeking emergency relief. See Horvitz Declaration. WMBC evidently believes it has a better chance of success at the Commission by attacking, rather than cooperating with, TCI-NNJ.

⁵ The Commission must appreciate that granting WMBC's requested relief will **not** necessarily resolve all copyright issues. The Copyright Office recently released a Notice of Inquiry examining whether the FCC's redesignation of television markets automatically controls copyright

Despite the groundless assaults made against it, TCI-NNJ does not oppose the Commission granting the requested relief. Such a decision should, however, be based on a desire to assist a new, apparently struggling, and somewhat confused broadcaster, rather than to penalize TCI-NNJ. The latter has done nothing wrong.

Respectfully submitted,

TCI OF NORTHERN NEW JERSEY

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January 18, 1994

liability. Notice of Inquiry, Docket No. RM 93-5, 58 Fed. Reg. 34594, 43596 (June 28, 1993). The problem is particularly acute in a case like this one, where the Commission is being asked to take a novel market redesignation approach. TCI-NNJ is not asking the Commission to defer action on that basis, but to recognize that TCI-NNJ cannot be sure that the Copyright Office ultimately will give full effect to a Commission decision.

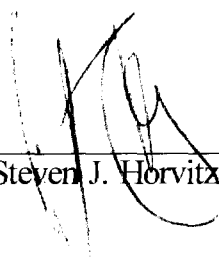
DECLARATION

I, Steven J. Horvitz, a partner at the Washington, D.C. law firm of Cole, Raywid and Braverman and counsel to TCI of Northern New Jersey, Inc., hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge and belief:

1. On November 5, 1993, I had a telephone conversation with WMBC's counsel, Chris Wood of the Washington, D.C. law firm of Fleischman and Walsh. In that conversation, I explained the copyright costs involved in TCI-NNJ's continued carriage of WMBC and the difficulty in dividing the system between WMBC's "local" and "distant" communities. Mr. Wood indicated in that conversation that he understood the situation and that his client was not interested in assuming any costs at that time. I explained that TCI-NNJ would begin notifying its subscribers of the pending deletion, and Mr. Wood expressed no objection.

2. In numerous subsequent conversations, Mr. Wood and I further explored the copyright issue and the possibility of dividing TCI-NNJ's cable system between WMBC's "local" and "distant" communities. Mr. Wood never suggested that the parties file a joint request for emergency relief, nor was I contacted about that possibility by Anne Swanson, who ultimately filed the request.

January 18, 1993



Steven J. Horvitz

DECLARATION

I, Gary Shaw, hereby declare under penalty of perjury that the following is true and correct;

1. I am the Community Affairs Coordinator of TCI of Northern New Jersey.

2. I have reviewed the foregoing RESPONSE TO REQUEST FOR TEMPORARY EMERGENCY RELIEF and hereby confirm that the factual statements made therein are true and correct to the best of my knowledge and belief.

Date

1/18/94

Gary Shaw

Certificate of Service

I, Andrea L. Brown, a secretary in the law firm of Cole, Raywid & Braverman, do certify that, except where hand delivery is otherwise noted, I have this date caused the foregoing to be sent by first class United States mail, postage prepaid, to the following:

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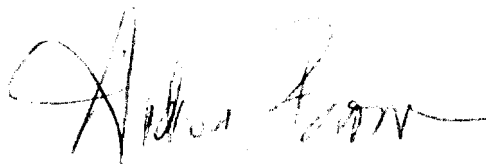
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